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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-2055

SECURITIES INVESTOR PROTECTION CORPORATION,
Petitioner,

v.

JAMES C. BARBOUR, as Receiver for Guaranty Bond and Securities Corporation and Guaranty Bond Company, Inc., and SECURITIES AND EXCHANGE COMMISSION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
For the Sixth Circuit

BRIEF FOR JAMES C. BARBOUR, RECEIVER

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INDEX

Page

Summary of the Case 1

Argument 8

I. Customers of a Member of SIPC Have an Implied Right of Action to Compel SIPC and the Commission to Meet Their Obligations Under the Act 8

A. Neither the Act nor its legislative history excludes such an action 8

B. Prior decisions of this Court do not exclude a private cause of action under the SIPA 14

II. If Customers of a Broker-Dealer Have an Implied Right of Action Under the Act, It May Be Asserted by an Equity Receiver Appointed and Ordered to Protect Their Interests 22

Conclusion 28

Appendix A-1

TABLE OF CASES

Allen v. Board of Elections, 393 U.S. 544, 22 L.Ed.2d 1, 89 S.Ct. 817 .....21, 22

Barlow v. Collins, 397 U.S. 159, 25 L.Ed.2d 192, 90 S.Ct. 832 19

Booth v. Clark, 17 Howard 322, 15 L.Ed. 164 25

Caplin v. Marine Midland Trust Co. of N. Y., 406 U.S. 416 (1972) 25, 26, 27

Clarke v. Chase National Bank, 137 F.2d 797 (CA 2, 1943) 25

Davis v. Gray, 16 Wall. 203, 21 L.Ed. 447 25

Fleischmann v. Maier Brewing Company, 386 U.S. 714, 18 L.Ed. 475, 87 S.Ct. 1404 17

J. I. Case Co. v. Borak, 377 U.S. 426, 12 L.Ed.2d 423, 84 S.Ct. 1555 (1964) 20, 21

Lohf v. Casey, 330 F.Supp. 356 6

McCandless v. Furlaud, 296 U.S. 140 (1935) 27

National RR Passenger Corp. v. National Association of RR Passengers, 414 U.S. 453 (1974) 14, 18, 19, 20, 22

Securities and Exchange Commission v. Joiner Leasing Corp., 320 U.S. 344 18

Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297, 88 L.Ed. 61 (1943) 16

U.S. v. Lewis, 338 F.2d 187 (CA 6, 1964) 24

Statutes

Administrative Procedure Act
5 U.S.C. § 500 19
5 U.S.C. § 701 19

Amtrak Act
45 U.S.C. § 501, et seq. 14

Federal Bankruptcy Act, Chapter X
11 U.S.C. § 587 25

Lanham Act
15 U.S.C. §§ 1051-1127 18

Securities Exchange Act of 1934
(15 U.S.C. § 78a, et seq.)
Sec. 14(a) (15 U.S.C. § 78n) 20
Sec. 21(e) (15 U.S.C. § 78(u)(e)) 20

Securities Investor Protection Act of 1970
(15 U.S.C. § 78aaa, et seq.)
Sec. 3(e) (3) (15 U.S.C. § 78ccc(e)(3)) 16
Sec. 5(a) (1) (15 U.S.C. § 78eee(a)(1)) 4, 6, 19
Sec. 5(b) (3) (15 U.S.C. § 78eee(b) (3)) 28
Sec. 6(a) (1) (15 U.S.C. § 78fffa) (1)) 9
Sec. 6(c) (2) (C) (15 U.S.C. § 78fff(c) (2) (C)) 9
Sec. 6(d) (15 U.S.C. § 78fff(d)) 16
Sec. 6(g) (15 U.S.C. § 78fff(g)) 10
Sec. 7(a) (15 U.S.C. § 78ggg(a)) 11
Sec. 7(b) (15 U.S.C. § 78ggg(b)) 11, 12, 13, 14, 19
Sec. 7(c) (15 U.S.C. § 78ggg(c)) 11

Voting Rights Act of 1965
(42 U.S.C. § 1973j (d) (e)) 21

17 C.F.R. 240, 15c 3-1 2

Other Authorities

Clark, Law of Receivers, 3rd Ed., § 355 25

House Report, U.S. Code Congressional and Administrative News, pp. 5254-5279 ..... 8, 13, 15

House Report, U.S. Code Congressional and Administrative News, p. 5281 ..... 9, 22

Letter of Samuel R. Pierce, Jr., General Counsel, Department of the Treasury to Honorable Harley O. Staggers, Chairman, Committee on Interstate and Foreign Commerce, House of Representatives, U.S. Code Congressional and Administrative News, p. 5281 9

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SUMMARY OF THE CASE

The complaint of Respondent Securities and Exchange Commission ("Commission"), filed December 22, 1969, sought only to enjoin the violation of designated provisions of the "Ex-

change Act"[1] and certain of the Commission's regulations, primarily its "net capital rule."[2] (SA 1-17).[3]

The Securities Investor Protection Act of 1970 ("SIPA" or "the Act")[4] became law eight (8) days later on December 30, 1970.

In the meantime, the defendant registered broker-dealer, Guaranty Bond and Securities Corporation ("Guaranty") had continued to transact business. On January 4, 1971, it filed an Answer denying that it had "knowingly and intentionally operated in contravention of" the statute and rules and outlined its continuing efforts at compliance.

It was not until January 6, 1971, following a hearing on the preceding day, that the District Court issued its preliminary injunction and Guaranty's operations ceased. (SA 41-53).

The Commission applied to the Court on January 21, 1971 for an order appointing a receiver to, among other things, "obtain an accounting of all funds and securities entrusted by customers and other persons to registrant" and alleging that receivership "is apparently the only remedy that will adequately protect the interests of the churches and other religious institutions for which registrant has been acting as underwriter and the interests of the other customers and creditors of registrant." (SA 18).

This Respondent was appointed receiver by an Agreed Order entered January 29, 1971 which contained a finding in the

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[1] The Securities Exchange Act of 1934, 48 Stat. 895, as amended, 15 U.S.C. § 78a et seq.

[2] 17 C.F.R. 240. 15c 3-1.

[3] "SA" refers to the separate or joint appendix filed herein.

[4] 84 Stat. 1636, 15 U.S.C. § 78aaa et seq.

words of the Commission's application that a receivership was necessary to adequately protect the interests of Guaranty's customers. It ordered the receiver "upon the Court's approval, to determine, adjust and protect the equities of creditors, customers and investors whose funds and other property have been entrusted to or invested with said corporation." (SA 55).

Respondent was further ordered to make an investigation and then "submit a recommendation to this Court for appropriate steps to be taken to protect the diversified interests of religious institutions for which said corporations have been acting as underwriter, and the interests of creditors and other persons dealing with the said corporations." (SA 58).

Respondent immediately came into possession of more than Fifteen Million ($15,000,000.00) Dollars worth of bearer bonds issued by religious institutions to finance construction of buildings and related facilities. Liquid assets of the insolvent corporations were minimal, however, and it became necessary to obtain court authorization to borrow money in order to defray the initial expense of the receivership.

Respondent determined that Guaranty's operations could not be brought into compliance with the requirements of the law and that there was no feasible course open except dissolution and liquidation. This recommendation was accepted by the Court.

The firm of Peat, Marwick, Mitchell & Co., Inc. was employed to conduct an audit of the bonds on hand and Respondent undertook to categorize the securities and determine their ownership.

After a hearing in which the Court adjudicated title to bonds in the aggregate value of more than Fifteen Million ($15,000,000.00) Dollars, Respondent, in compliance with the Court's order, submitted a plan for liquidation and partial distribution

of the bonds and payment of net cash balances due Guaranty's customers. (App. pp. A-1-A-4).[5]

Because the assets of the receivership estate, including the assets of the corporations affiliated with the broker-dealer, were apparently insufficient to pay such balances and also defray the continuing cost of the receivership, the receiver recommended and the Court ordered that the bonds be released to their owners upon deposit of a sum equal to five (5%) percent of the face amount of the securities. (App. pp. A-5-A-6). Respondent has since reimbursed the bond holders in amounts equal to seventy (70%) percent of their original deposits, i.e. 3.5% of bond values. The remaining thirty (30%) percent amounts to approximately One Hundred Seventy-Five Thousand ($175,-000.00) Dollars.

In February 1971, the Commission called to Respondent's attention the possible applicability of the SIPA and he was led to believe that the Commission was notifying SIPC of Guaranty's financial condition. For some reason never explained in this record, however, information conveyed by the Commission's regional office in Atlanta to its Washington office failed to reach SIPC.[6]

Respondent was unaware that the Commission had not notified SIPC as it was required to do by Section 5 of the Act, 15 U.S.C. § 78eee(a)(1). He assumed that both the Commission and SIPC would meet their statutory obligations and he pro-

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[5] "App." refers to the appendix hereto.

[6] In the District Court, counsel for the Commission stated that he was not able to determine "whether it got lost . . . or whether some lower staff official believed that SIPC intervention wasn't necessary in this case . . ." SIPC counsel stated that it was his understanding, "which is imperfect, because I wasn't at SIPC at the time, but it is my understanding that there was a conscious decision made by somebody, whose name I don't have in my mind right now, at the Commission to the effect that this Act had no application in this."

ceeded to discharge his own responsibilities under the orders of the District Court, particularly to devise and put into effect a plan to return to Guaranty's customers their securities and net credit balances.

Later, having received no communication from either the Commission or SIPC as to the latter's intention to proceed under the Act, Respondent instructed his attorney to review the SIPA and, if he concluded that it was applicable, to take such steps as might be necessary to invoke its provisions. On May 27, 1971, Respondent's attorney wrote to the Chairman of SIPC and thus gave Petitioner its first notice of the financial plight of its member and the pending proceeding. (SA 24).

SIPC then commenced a series of requests for voluminous documentary information from the receiver, all of which was supplied. Instead of taking a position, pro or con, as to the applicability of the Act, however, SIPC asked that Respondent's attorney write a letter stating his reasons why he thought the customers of Guaranty were entitled to protection under the Act. This was done on June 24, 1971. (SA 26.) The Commission's report followed on July 1, 1971.

SIPC still gave Respondent no intimation of its position until finally, on September 23, 1971, Respondent's attorney wrote again to the Chairman of SIPC requesting its decision. The reply of SIPC's general counsel on October 5, 1971, even at this late date took no unequivocal stand but indicated that while additional information would be helpful, "based on the information presently available this Corporation has no plans for filing an application for the appointment of a Trustee in this proceeding." (SA 38). Respondent had become so frustrated at not being able to obtain a definite answer from Petitioner that he had requested United States Senator William E. Brook, Jr., from Tennessee, to seek a response from SIPC. (SA 40).

In answer to a further inquiry from Respondent's attorney, SIPC's letter of November 1, 1971 indicated that its reasons for not intervening in the pending proceeding were "complex and interrelated." It noted that they "involve" the question of retroactivity and the ability of an SIPC trustee to carry out the purposes of the Act at this point in the proceeding. (SA 39).

While the Commission had received a copy of the letter from Respondent's counsel to SIPC on May 27, 1971 and had submitted its report to SIPC on July 1, 1971,[7] it took no action to obtain an adjudication as to whether SIPC should intervene in the pending proceeding.

Respondent was at a loss to know how to proceed but found that a similar question as to the applicability of the Act had been raised and adjudicated in the United States District Court in Colorado in *Lohf v. Casey*, 330 F.Supp. 356. After investigating the pleadings in that action and undertaking unsuccessfully to determine why the Commission had failed to notify SIPC, and to obtain assistance from Commission counsel as to choice of venue,[8] Respondent filed his Petition No. 22 in the District Court against both SIPC and the Commission alleging that he had "done everything within his power to protect the interests of the customers of Guaranty Bond and Securities Corporation, including the return of their bonds and excess credit balances" but that it appeared that they would sustain a loss equal to a portion of the five (5%) percent reserve fund and praying for the entry of an order requiring Respondents to show cause why SIPC should not be required to intervene and afford Guaranty's customers the benefits of the Act. (SA 19-27).

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[7] The Commission did not even then undertake to give SIPC the statutory notice required by § 5(a)(1) of the Act and apparently has never done so. (SA 63).

[8] "You ask our advice as to the proper venue of a proceeding to raise the issues regarding SIPC. I am sorry but we have not researched this question." (SA 66).

SIPC's answer to Respondent's petition alleged that the Act was not applicable to Guaranty, that the receivership proceeding had progressed to such a point that it was not feasible to carry out a proper liquidation under the Act, that SIPC was vested with discretion as to whether or not it would intervene and that the District Court lacked jurisdiction. (SA 29-37).

The Commission's answer admitted that it had advised the receiver of the possible applicability of the Act and that its regional office had conveyed information to the Commission's headquarters in Washington, D.C., but it gave no explanation for its failure to notify SIPC. It alleged that the lack of notice was irrelevant as to the Act's applicability and questioned whether or not Guaranty's customers would sustain a loss. (SA 62-71).

The District Court found that SIPC's response raised three (3) questions: (1) lack of personal jurisdiction over SIPC; (2) lack of subject matter jurisdiction; and (3) exclusion of Guaranty by terms of the Act. While it held the Act inapplicable under the issue of retroactivity, it ruled that "Section 7(b) should give rise to a similar cause of action by a receiver in behalf of a member's customers" and that this was necessary in order to give meaningful effect to the Act in the protection of SIPC's members and their customers. (SA 72-78).

The Court of Appeals found the Act to be applicable and the receiver to have standing, as a representative of the broker-dealer's customers, to initiate the private action implied under the Act. (SA 80-89).

ARGUMENT

I

Customers of a Member of SIPC Have an Implied Right of Action to Compel SIPC and the Commission to Meet Their Obligations Under the Act.

A. **Neither the Act nor its legislative history excludes such an action.**

The very name of this Act evidences its general purpose. Specifically, Congress undertook "to provide greater protection for customers of registered brokers and dealers and members of national securities exchanges." The protection was to be accomplished by the establishment of a fund to make it possible for such customers to recover "their cash balances or securities" within the limitations of Fifty Thousand ($50,000.00) Dollars for each customer as to securities and Twenty Thousand ($20,000.00) Dollars as to cash balances.[9]

Congress recognized the need of such customers to be similar "to that which prompted the establishment of the Federal Deposit Insurance Corporation and the Federal Savings and Loan Insurance Corporation."[10]

A previous bill, H.R. 18458 had provided for the establishment of a private, non-profit insurance corporation but H.R. 19333 pursued an alternate plan based on the creation of a fund by assessment of SIPC members. The Treasury Department advised Congress "that H.R. 19333 fairly incorporates the objectives of H.R. 18458 to insure customers against loss from

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[9] House Report No. 91-1613, U.S. Code Congressional and Administrative News, pp. 5254-5279.

[10] *Id.*

business failures of member broker/dealers in the securities industry."[11]

In the present case, Guaranty's customers failed to receive their securities and cash balances to the extent that they were required to make a deposit of five (5%) percent of the face value of their bonds in order to obtain delivery. Because of SIPC's refusal to intervene and the Commission's failure to act, they have been denied the protection specifically provided by Congress.

Under these circumstances, the question then arises as to whether Congress intended for Guaranty's customers to sit helplessly by without a remedy.

Both SIPC and the Commission have questioned the fact of their losses. But it cannot be disputed that the customers were required to make a five (5%) percent deposit about April, 1971 and that only a portion of it has been returned to them in almost four years. Had the Commission given timely notice to SIPC, as it was required to do by the Act, and had SIPC intervened promptly thereafter, the customers would have received their bonds without assessment since the Act provides that:

> "The trustee shall return specifically identifiable property to the customers of the debtor, entitled thereto."
> 15 U.S.C. § 78fff(c)(2)(C).

Moreover, the Act contemplates that this will be accomplished "as promptly as possible" after the Trustee is appointed and he is required to "discharge promptly" the obligations of the debtor to its customers. (15 U.S.C. § 78fff(a)(1) and (g)).

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[11] Letter of Samuel R. Pierce, Jr., General Counsel, Department of the Treasury to Honorable Harley O. Staggers, Chairman, Committee on Interstate and Foreign Commerce, House of Representatives, U.S. Code Congressional and Administrative News, p. 5281.

Most significantly, Congress stipulated that the Court "shall" authorize the Trustee to pay customers their credit balances "notwithstanding the fact that there shall not have been any showing or determination that there are sufficient funds of the debtor available to make such payment . . ." (15 U.S.C. § 78fff(g)).

In the very teeth of this Congressional policy, the Commission and SIPC have insisted that SIPC intervention is not necessary because the customers' losses might be offset by recoveries from the principals of the broker-dealer and they cite language of the District Court's findings and conclusions as to the "defendants" fraudulent conduct. While it is not entirely clear, this finding apparently relates to the corporate defendants only. (SA 51). The receiver has discovered no instances in which the principals derived illegal personal gain from the violations of the Exchange Act and has found no unencumbered assets of the principals out of which to satisfy any judgment obtained. But even if the receiver is mistaken, the customers should not be penalized. SIPC could reimburse them promptly and then pursue its rights of subrogation against the principals if it determines that recoveries may be made.

Both the Commission and SIPC insist that the Act granted to the Commission the exclusive right to compel SIPC to meet its obligations but this is not revealed by the Act's legislative history. There is no indication that the question of a private right of action was ever considered by Congress at any time.

From an examination of the Act itself, however, it is clear that Congress did not exclude any type of suit by any class of litigant. In providing that SIPC might be sued "in any court, state or federal," it must have contemplated that occasions would arise when some aggrieved person, firm or corporation should be allowed to bring suit. Yet it drew no line of demarcation and proscribed no type of action.

One must resort then to Section 7(b) of the Act in order to glean an intimation of Congressional intention to limit the type of suit or litigant which may bring SIPC into "any court, state or federal."

Section 7 is entitled "SEC Functions," and sub-section (a) deals in mandatory terms with the Commission's rule making power.

Sub-section (b), entitled "Enforcement of Actions," is permissive in character and provides that the Commission "may apply" for an order against SIPC.

Sub-section (c) is divided into two sub-sub-sections. The first is again permissive and provides that the Commission "may" make examinations and inspections and require records and reports of SIPC. The second is mandatory, stipulating that SIPC shall submit an annual report to the Commission and that the report shall include financial statements which shall be audited and that the report shall be transmitted by the Commission to the President and the Congress.

While we realize that the paragraphing and topic headings employed by Congress can be given only limited significance, it does appear that Section 7 is but a listing of SEC's functions and it does not on its face purport to set forth the exclusive procedure by which the Act may be enforced.

The insistence of the Commission and SIPC might be more persuasive if Section 7(b) were mandatory in character. Then it might be argued that customers need have no fear that their interests will not be protected because the Commission is under a statutory duty to compel SIPC to meet its obligations under the Act. Under the interpretation urged upon the Court by the Commission and SIPC, however, the latter might for any reason deemed sufficient by it, decline to afford protection to the customers of a member while the Commission might, for that or

some other reason deemed sufficient by it, choose not to press the point by seeking an order under Section 7(b).

Of course, this is precisely what has happened in the present case and the SIPC contends that Guaranty's customers are completely without remedy.[12] We submit that Congress never intended customer protection to be at the arbitrary whim and caprice of the Commission and SIPC. Perhaps in any given case, the circumstances may be such that SIPC should not be required to intervene but this is a matter which should be judicially determined and the customers should at least be allowed their day in court.

SIPC argues that Section 7(b) must be construed as vesting an exclusive right in the Commission for several reasons. First, it points out that the Act contains a self-regulatory mechanism which now (as contrasted with the early days of its existence) gives it an "early warning" as to members approaching financial difficulty. Second, it contends that the Act contemplates the exercise of high level discretion on the part of SIPC and then grants to the Commission the extraordinary power to seek what amounts to a mandatory injunction against SIPC.

These are plausible arguments skillfully presented. But when the "mechanism" and the "discretion" and the "extraordinary power" have all utterly failed to achieve the manifest purpose of the Act, the question still remains as to whether Congress intended to leave customers thus remediless. SIPC concedes that it is a "small organization." It has many members and thousands of investors in the 50 states to protect. The Commission's surveillance of SIPC is only one of a myriad of activities with which it is burdened and it therefore may not be assumed that these two bodies will not ever overlook a situation in which

[12] The Commission concedes that its "determination" not to take action may be judicially reviewable. The Receiver has never been advised as to the fact or the reasons for such determination.

customers deserve protection or ever make an unwise or perhaps arbitrary decision as to whether or not in fact they should be protected.

The customers themselves have the greatest stake in seeing that the legislative purpose is carried out. They know better than anyone else the extent of their losses. It was Congress's concern for their welfare which brought about the enactment of the legislation. The mechanism, discretion and extraordinary power were created merely as a means to accomplish that end, not as the end itself. When the means fails to even set the procedure in motion, the legislative purpose must not be frustrated when federal courts have the power to fashion a remedy to implement that purpose.

Having extolled the virtues of the "means" prescribed by Congress, SIPC then argues that the exclusivity of Section 7(b) is indicated by Congress's failure to grant a similar power to self-regulatory organizations such as the exchanges and dealer associations. This would not appear to be of significance since the legislative history records the failure of such organizations to provide adequate customer protection in the first place. (House Report, U.S. Code Congressional and Administrative News, p. 5257). Indeed, this was one of the reasons for enacting the legislation and there would be no logical reason to give these same organizations supervisory and enforcement powers over SIPC.

The legislative scheme for surveillance and enforcement by the Commission was a logical extension of that Agency's existing functions but it is adequate only if the securities investor also has a right of action to seek protection when the system fails.

B. **Prior decisions of this Court do not exclude a private cause of action under the SIPA.**

SIPC relies upon *National RR Passenger Corp. v. National Association of RR Passengers*, 414 U.S. 453 (1974) ("Amtrak") and certainly no consideration of the present case would be complete without reference to that decision. It is true that there are similarities between the two Acts but the distinctions are decisive.

The Court there applied the maxim, *expressio unius est exclusio alterius*, which is frequently a helpful tool in statutory construction. The Amtrak Act, however, expressly conferred a private cause of action on employees and labor unions in addition to the enforcement powers granted the Attorney General. It therefore impliedly excluded any other private cause of action.

Here, on the other hand, the Act is silent as to private causes of action but grants only the power vested in the Commission under Section 7(b), which is roughly analogous to the power given the Attorney General by the Amtrak Act.

The application of the maxim there was further strengthened by the legislative history which indicated an unsuccessful attempt to amend the Act so as to give a private cause of action to any persons aggrieved. No such attempt was made with reference to the SIPA and it therefore cannot be argued that Congress rejected the concept of a private enforcement action.

Equally, if not more important, is the effect upon the stated legislative purpose of allowing a private cause of action under each of the two Acts. This Court found that to permit railroad passengers to enjoin the discontinuance of uneconomic lines would frustrate one of the principal objectives of the Amtrak Act. To permit securities investors to compel SIPC to meet its obligations to them under the Act, on the other hand, can only

serve to make certain that the legislative purpose of customer protection is accomplished. SIPC and the Commission disagree and SIPC contends that to grant such a cause of action will "subvert the statutory apparatus and the balancing of public interest." (SIPC Br., p. 31). It points out that the commencement of a private action could interfere with consideration of a member's difficulties, could frustrate efforts to find alternatives to liquidation and could start a run on a firm in marginal financial condition. These are, of course, important considerations but they are not, in the final analysis, the situation which Congress undertook to remedy.

As stated in the House Report:

> "The primary purpose of the reported bill is to provide protection for investors if the broker-dealer with whom they are doing business encounters financial trouble. In these circumstances public customers sometimes encounter difficulty in obtaining their cash balances or securities from the broker-dealer."
>
> U. S. Code Congressional and Administrative News, p. 5255.

The legislation was enacted as an alternative to a plan such as the Federal Deposit Insurance Corporation Act and Congress's concern was that customers obtain the return of their securities and cash balances. The protection of SIPC's "consideration" of members' difficulties and its efforts to find alternatives to liquidation and to avoid a run on a member are all preliminary matters which are important in this statutory scheme only to the extent that they ultimately insure that the customers recover "that to which they are entitled." U.S. Code Congressional and Administrative News, p. 5255.

It is insisted that Congress gave SIPC and the Commission discretion to achieve the goal of customer protection "in the manner most consistent with the public interest." (Comm. Br.,

p. 9). This is a plausible premise but the Commission's conclusion does not follow. It cites sections of the Act requiring public access to reports unless "not in the public interest," permitting the Commission to make rules and regulations "in the public interest" and requiring completion of open contractual commitments consistent with "the public interest."[13] Neither these nor any other sections of the Act suggest a Congressional caveat that customers are not to be protected unless the Commission and SIPC determine, in their discretion, that it is in the public interest. The "forbearance" which they stress can be ordered by any Court to which application is made so long as SIPC is indeed seeking "other viable solutions." In the instant case it took no action and failed to so much as reveal its intentions for approximately four months until pressed by this Respondent.

The Commission argues that it, "and not customers or a receiver of a broker-dealer, should determine whether SIPC has acted improperly in not instituting liquidation proceedings."[14] But we submit that this is a matter to be determined by none of these parties but by the United States District Court to which application is made. We seek only an opportunity to make the application, not the determination.

SIPC relies also upon *Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297, 88 L.Ed. 61 (1943) which, unlike the present case, involved judicial review of an administrative board decision. There, however, the Railway Labor Act provided a "neutral tribunal" to make decisions after consideration of the contentions of disputing parties. There was thus an opportunity for the complaining Union to be heard by the administrative body. This Court found that Congress

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[13] 15 U.S.C. § 78kkk(a); 15 U.S.C. § 78ccc(e)(3); 15 U.S.C. § 78fff(d).

[14] Commission Brief, p. 13.

intended the Board's determination in jurisdictional disputes to be final and not subject to judicial review, particularly because Congress had spelled out provisions for judicial review in other sections of the Act relating to determinations by the National Railroad Adjustment Board in disputes concerning rates of pay, rules, or working conditions and awards of boards of arbitration. This Court said:

> "When Congress in Section 3 and in Section 9 provided for judicial review of two types of orders or awards and in Section 2 of the same Act omitted any such provision as respects a third type, it drew a plain line of distinction."
>
> 88 L.Ed. 67.

There are no comparable provisions in the SIPA. Neither SIPC nor the Commission makes an order or award after a hearing in which securities investors are allowed to present their appeal for protection under the Act. Both SIPC and the Commission make ex parte determinations and, as appears from the present case, it can be difficult to even obtain such a determination, much less to discover its basis. To adopt their interpretations of the Act, one must conclude that Congress simply foreclosed securities investors from asserting their own rights and left them to the mercy of SIPC and the Commission which need not account to anyone. In this connection, while SIPC must file an annual report which the Commission forwards to the President and Congress, there is no suggestion that such a report would afford any reasonable basis for a review of SIPC's determination and the Commission's acquiescence that the customers of a particular broker-dealer were not entitled to protection under the Act.

Petitioner quotes from *Fleischmann v. Maier Brewing Company*, 386 U.S. 714, 18 L.Ed. 475, 87 S.Ct. 1404 to the effect that when a cause of action has been created by a statute which provides specific remedies, others will not be readily implied.

That case involved the Lanham Act (15 U.S.C. §§ 1051-1127) which provided in Section 35 that a plaintiff in a trademark violation suit may recover (1) defendant's profits, (2) damages sustained by plaintiff and (3) costs of the cause. The Court held merely that plaintiff might not also recover its attorney's fees.

The language quoted by Petitioner has no application to the facts of this case because the SIPA does not in so many words grant any specific remedy to securities investors. The surveillance and enforcement powers of the Commission are no remedy available to investors. As to these provisions, broker-dealer customers are mere onlookers or bystanders with no opportunity to be heard. Therefore, in the absence of an express prohibition, a private cause of action should be implied which is adequate to achieve the stated legislative purpose.

In *Amtrak*, this Court acknowledged that principles of statutory construction such as the maxim—*expressio unius est exclusio alterius*, must yield to clear contrary evidence of legislative intent and in *Securities and Exchange Commission v. Joiner Leasing Corp.*, 320 U.S. 344, it was held that such maxims must be "subordinated to the doctrine that courts will construe the details of an Act in conformity with its dominating general purpose." 88 L.Ed. 93. The "dominating general purpose" of the SIPA is clearly protection of securities investors[15] and the specific objective is the establishment of a procedure under which they can obtain the return of their securities and cash balances within the limitations prescribed. When both SIPC and the Commission fail or refuse to activate that procedure and Congress has not plainly proscribed it, a private cause of action should be implied.

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[15] In *Amtrak* it was argued that "railroad passengers are merely indirect beneficiaries" of the Act (475 F.2d 340) and this Court observed only that "respondent claims that railroad passengers are the intended beneficiaries of the Act." (38 L.Ed.2d 651). There can be no dispute that securities investors are designated as the direct and primary beneficiaries of the SIPA.

It will be recalled that the receiver's Petition No. 22 was directed to both the Commission and SIPC and the Court entered its Order No. 49 requiring each to show cause why "the remedies afforded by the Act should not be made available in this proceeding." (SA 28). The Administrative Procedure Act (5 U.S.C. § 500, et seq.) was not cited in the Petition as a basis for jurisdiction but the judicial review sections (5 U.S.C. § 701, et seq.) would presumably be applicable to the Commission, if not SIPC. The latter is not an agency of the United States Government but is, at most, a quasi-public corporation not for profit.

The APA does not apply to agency action to the extent that it is committed to the agency's discretion by law. (5 U.S.C. § 701). Section 7(b) of SIPA provides that the Commission "may" apply for an order. Section 5(a)(1) of the Act, however, is mandatory and requires the Commission to notify SIPC that a member is in or approaching financial difficulty. The response of the Commission in the District Court admits that it failed to give official notice to SIPC and implies that it has never made a formal determination with respect to whether or not it should seek an order against SIPC under Section 7(b). It merely alleges that there has been no demonstration that Guaranty's customers will suffer a loss. (SA 64). The inference is that if in fact they will sustain a loss, the Commission might agree that SIPC should be required to intervene. This is slight comfort in view of the Commission's demonstrated lack of enthusiasm for taking any affirmative action on behalf of Guaranty's customers other than the application for the appointment of a receiver. In the meantime, they are left in limbo unless they are permitted to help themselves through the efforts of that same receiver.

As this Court observed in *Barlow v. Collins*, 397 U.S. 159, 25 L.Ed.2d 192, 90 S.Ct. 832:

"The right of judicial review is ordinarily inferred where Congressional intent to protect the interests of the class of which the plaintiff is a member can be found: in such cases, unless members of the protected class may have judicial review of statutory objectives might not be realized." (sic)

25 L.Ed.2d 200.

While we have found no previous decision of this Court which presents precisely the situation prevailing in the present case, the decision in *J. I. Case Co. v. Borak*, 377 U.S. 426, 12 L.Ed.2d 423, 84 S.Ct. 1555 (1964), seems more nearly in point than *Amtrak*. It is significant that the Court was dealing there with securities legislation and a matter specifically entrusted to the Commission for enforcement. It was held that federal courts have the power to grant all necessary remedial relief in a stockholder's suit for violation of Section 14(a) of the Securities Exchange Act of 1934. That Act provides at Section 21(e) as follows:

"Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule or regulation thereunder, it may in its discretion bring an action in the proper District Court of the United States or the United States courts of any Territory or other place subject to the jurisdiction of the United States to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond." • • •

15 U.S.C. § 78(u)(e).

It was contended that Congress made no specific reference to a private right of action but the Court replied:

"While this language makes no specific reference to a private right of action, among its chief purposes is the 'protection of investors' which certainly implies the availability of judicial relief when necessary to achieve that result."

12 L.Ed.2d 427.

The Commission seeks to distinguish *Borak* and other private enforcement action decisions because the statutes there involved provided "standards of conduct" for the protection of investors which private actions assist in enforcing. Here, however, Congress provided a fund and a procedure for the protection of investors and we submit that the importance of achieving that legislative purpose is not diminished by the absence of the incidental benefits of enforcement. Congress attached no such condition.

The later case of *Allen v. Board of Elections*, 393 U.S. 544, 22 L.Ed.2d 1, 89 S.Ct. 817, is also in point. It relied on *Borak* in holding that private citizens have standing to bring an action in the federal court to enforce provisions of the Voting Rights Act of 1965 even though this right is expressly conferred upon the Attorney General. Section 12 provides that the Attorney General "may institute" an action for preventive relief, including an application for a temporary or permanent injunction and that he "may" file with the District Court an application for an order with respect to the marking and counting of ballots. (42 U.S.C. § 1973j(d)(e).

This Court noted that the Act "does not explicitly grant or deny private parties authorization to seek a declaratory judgment that a state has failed to comply with the provisions of the Act." (22 L.Ed.2d 11).

It held, however, that "there is certainly no specific exclusion of private actions" and it observed:

> "The achievement of the Act's laudable goal could be severely hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General."
>
> 22 L.Ed.2d 11-12.

The Court found merit in the argument "that the specific references to the Attorney General were included to give the Attorney General power to bring suit to enforce what might otherwise be viewed as 'private' rights." (Footnote 18, 22 L.Ed.2d 11).

It also noted that the guarantee of the Act as regards the necessity for approval of voter laws "might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement of the prohibition." (22 L.Ed.2d 12).

By this same reasoning, Congress's undertaking to "insure customers against loss" will prove to have been an idle gesture as to Guaranty's customers unless this private cause of action is sustained. (U.S. Code Congressional and Administrative News, p. 5281).

II

If Customers of a Broker-Dealer Have an Implied Right of Action Under the Act, It May Be Asserted by an Equity Receiver Appointed and Ordered to Protect Their Interests.

While the questions of implied right of action and standing are separate matters, as observed by this Court in *Amtrak*, we take it that Petitioner does not controvert the right of customers to assert directly such cause of action as may be implied under the Act. Its contention is rather that "a receiver lacks standing to assert that right on their behalf under controlling decisions of this Court." (Petitioner Br., p. 32).

There are many types of receivers, appointed pursuant to either a specific statute or the inherent equity power of the Court, under a variety of circumstances and for different purposes. Respondent was appointed under the broad equity powers of the District Court, not merely to collect and conserve the debtor's assets for the benefit of its creditors but "upon the Court's approval, to determine, adjust and protect the equities of creditors, customers and investors whose funds and other properties have been entrusted to or invested with said corporations." (SA 55). He was ordered to "submit a recommendation . . . to protect the diversified interests of religious institutions for which said corporations have been acting as underwriter, and the interests of creditors and other persons dealing with the said corporations." (SA 58).

Immediately upon his appointment, the receiver found himself custodian of more than $15,000,000.00 worth of bearer bonds which had to be audited, classified and either liquidated or distributed if it developed that they were the property of others. He ultimately determined and the District Court held that the bonds were not assets of the receivership estate and should be distributed to the rightful owners. The problem was that the actual assets of the estate were not sufficient to pay customers their net cash balances and to defray the costs and expenses of the receivership, many of which were incurred in the auditing, classifying and distribution of the customers' securities.

It was the receiver who recommended to the Court that he be allowed to return the bonds to the record owners and pay their cash balances but that they each be required to make a cash deposit equal to five (5%) percent of the face value of the bonds as adjusted by such balances.

Thus, while the receiver was engaged in carrying out his instructions to protect the interests of the customers, he also found it necessary, with the approval of the Court, to exact an assess-

ment from these same customers. It is therefore only fitting and proper that he should take the initiative in attempting to recover for those investors the remainder of the deposit which he has been unable to return to them. He has pursued this obligation by filing a petition in the Court which appointed him. (*U. S. v. Lewis*, 338 F.2d 187 (CA 6, 1964)). This is the Court which is most familiar with the plight of the customers, having approved the plan for distribution and assessment. This Court is more knowledgeable than any other court in the land as to whether or not the customers of Guaranty Bond and Securities Corporation "are in need of protection" under the Act.

The receiver has proceeded as an officer and representative of the Court which has repeatedly expressed its concern that the protection of the religious institutions and individual customers of Guaranty be placed above all other considerations in the administration of the receivership estate. It was for this reason, again with the approval of the Court, that the assets of the affiliated corporations were pooled with those of the broker-dealer in order to assure sufficient funds out of which to return to the investors their net cash balances. This substantially depleted the assets of the receivership estate and contributed to the necessity for the five (5%) percent reserve fund.

The standing of the receiver depends upon his power and duty to represent the interests of the customers. In general:

> "A receiver has the following powers and duties.
>
> First: Those powers and duties directly stated in the order of the Court appointing the receiver and such subsequent powers and duties as may from time to time be given.
>
> "Second: Those powers or duties clearly implied from the order or orders of the Court appointing the receiver and

> which are clearly and reasonably necessary to the carrying out of such order or orders."
>
> Clark, *Law of Receivers*, 3rd Ed., § 355.

In *Booth v. Clark*, 17 Howard 322, 15 L.Ed. 164, it was said that a receiver "is appointed in behalf of all parties, and not of the complainant or of the defendant only. He is appointed for the benefit of all parties who may establish rights in the cause." (15 L.Ed. 168).

In *Davis v. Gray*, 16 Wall. 203, 21 L.Ed. 447, it was said that a receiver "is virtually a representative of the Court, and of all the parties in interest in the litigation wherein he is appointed." (21 L.Ed. 452).

Petitioner places great reliance on the decision in *Caplin v. Marine Midland Trust Co. of N. Y.*, 406 U.S. 416 (1972), and *Clarke v. Chase National Bank*, 137 F.2d 797 (CA 2, 1943), which preceded it. There it was held that a Chapter X[16] trustee could not bring suit against an indenture trustee on behalf of bond holders because: (1) Chapter X gives the trustee no such power; (2) The debtor for whom the trustee was appointed, being *in pari delicto*, had no independent claim against the indenture trustee and (3) The trustee's action would be in conflict with any independent actions brought by individual bond holders.

We do not believe these decisions to be controlling here since Respondent is not restricted by the provisions of Chapter X which goes no further than to give the trustee the powers a receiver in equity would have if appointed by a court of the United States "for the property of the debtor." Here Respondent was not appointed as receiver of the property of the debtor alone but was ordered to protect the interests of the debtor's customers and investors.

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[16] 11 U.S.C. § 587.

It may be true that Guaranty Bond and Securities Corporation has no implied right of action under the statute since the Act was not intended for the protection of broker-dealers, but here Respondent was appointed as a representative of all the parties, not Guaranty alone and he was required to submit a plan to protect the interests of the religious institutions and other persons dealing with the debtor. That plan achieved the Court's objective of returning to the customers their securities and net cash balances but, in so doing, it created the loss which the receiver now seeks to recover on behalf of those same parties.

The third reason assigned in *Caplin* is likewise inapplicable here since the receiver's action cannot be inconsistent with any individual actions brought by Guaranty's customers. The only objective of this or any individual proceeding is to require SIPC to meet its obligations under the Act. If successful, the relief granted in each case would be identical. Any independent action by individual customers could only complement and strengthen the receiver's application.

While Petitioner protests that the receivership has progressed beyond the point at which the statutory purpose can be accomplished, we insist that the primary purpose of the statute was to insure that customers receive their securities and net cash balances. The liquidation procedure of which Petitioner makes so much is only the means by which this is to be accomplished. It is not in a position to complain if the receiver has already carried out most of this procedure, even if he did not follow the letter of the Act, provided only that the interests of investors were duly protected. There is no suggestion to the contrary. So long as these customers continue to be deprived of the return of their cash balances, there is indeed an opportunity for Petitioner to carry out the statutory purpose and it should be required to do so.

Petitioner also makes the point that because of its right of subrogation, the net asset value of the receivership estate would not be affected by a decision in Respondent's favor. This is true but immaterial. The question here, unlike that in *Caplin*, is whether Guaranty's customers are entitled to be protected in conformity with the District Court's instructions to the receiver. It is of no consequence that the general receivership estate will not be increased or decreased since the receiver's powers and duties are not limited to the preservation and distribution of those assets.

Petitioner also relies upon *McCandless v. Furlaud*, 296 U.S. 140 (1935) which sustained the right of the receiver to sue promoters of the corporation who took unconscionable profits on the sale of the company's stock and bonds. The majority of the Court held that these profits were assets of the corporation which had been diverted and could be reclaimed by the receiver whether or not the corporation would have been estopped. Four members of the Court were of the opinion that the receiver's right was no greater than that of the corporation and he lacked standing to bring suit. The decision is not helpful here because of the broader scope of the powers and duties assigned to Respondent by the District Court's Order and the subsequent proceedings which placed the receiver in a fiduciary relationship to Guaranty's customers and gave rise to his obligation to assist them in recovering the remainder of their net cash balances exacted of them under his plan of partial distribution.

No reported decision which we have been able to discover has dealt with a situation precisely like the one in the instant case. Guaranty's customers were more than "a special class of Guaranty Bond's creditors" as they are characterized in Petitioner's brief. Guaranty, and later Respondent, stood in a fiduciary relationship to these customers holding their property in trust. It is the primary objective of the SIPA to achieve the return of that very property to such customers. It was likewise

the primary objective of the District Court in this case. Because of the inadequacy of the available assets, the receiver was, in effect, forced to withhold five (5%) percent of the customer's property. There seems to be no sound reason why he should not have standing to take the next step and seek to obtain for the customers the reimbursement of the withheld funds by invoking the provisions of a statute passed for the specific purpose of so protecting them.

The Court of Appeals has held the Act applicable to Guaranty's operations and certiorari was not granted as to this portion of the ruling. Should it now be held that Guaranty's customers have an implied right of action against SIPC but that Respondent has no standing to assert it, it may be presumed that one or more of such customers will promptly initiate a direct proceeding to accomplish the same result.

CONCLUSION

Perhaps it should be said that in pressing this cause Respondent seeks only to discharge the duties and obligations placed upon him by the District Court. It may be that, if successful, he will have brought about his own dismissal since under Section 5(b)(3) of the Act, SIPC has the right to "specify" a trustee of its choice. He nevertheless earnestly insists that there is no valid reason why Guaranty's customers should be denied the benefits of the Act and he urges this Court to affirm the decision of the Court of Appeals.

Respectfully submitted

W. OVID COLLINS, JR.
18th Floor
Third National Bank Building
Nashville, Tennessee 37219
Attorney for Respondent

APPENDIX

Filed:

April 7, 1971

In the United States District Court
For the Middle District of Tennessee
Nashville Division

Securities and Exchange Commission
vs.
Guaranty Bond and Securities Corporation, et al.
} Civil Action No. 5989

Petition No. 14 of James C. Barbour, Receiver
Plan for Partial Distribution

Petitioner respectfully shows to the Court:

I

That pursuant to the provisions of Order No. 20 herein, petitioner has consulted and conferred at length with his attorney and accountants and has considered suggestions from attorneys for various petitioners herein in an effort to arrive at a workable plan for partial liquidation and distribution which would enable him to make delivery of the bonds in his custody to their owners without further delay, while at the same time maintaining a reserve fund against contingencies, discrepancies, conflicting claims and the continuing costs of the receivership for an undetermined period of time.

II

That petitioner and his advisers first considered the possibility of retaining a certain percentage of the bonds for this purpose but certain problems were anticipated: the selection of the particular bonds to be retained, the liquidation of the bonds when cash is needed, the selection of the bonds to be liquidated, the partitioning in kind of small I.M.A. accounts, the expense of two distinct distributions and the continuing processing of retained bonds until final liquidation.

III

That petitioner therefore proposes that all bonds in his custody and those held by others under Order No. 10 be released to the record owners upon deposit with Nashville City Bank and Trust Co. or the owner's bank to the Receiver's credit, of a sum of money in cash, equivalent to 5% gross of the face amount of the bonds on January 29, 1971 adjusted by credit and debit balances as of the settlement date. The issuance of statements of account can begin almost immediately after entry of an appropriate Order. Thus, if a particular I.M.A. customer owns one $5,000.00 bond and has a credit balance of $100.00, the deposit of 5% gross would amount to $250.00 but it would be reduced by the credit balance of $100.00 to a net cash payment of $150.00 required in order to obtain delivery of the bond. If, on the other hand, the customer had a debit balance of $100.00 (there are very few of these), this sum would be added to the 5% and the customer would be required to make a payment of $350.00 in order to get possession of his bond. In cases where credit balances exceed 5% of the face value of the bonds, distribution of such excess amounts will be made by the Receiver after sufficient funds are accumulated to pay all such amounts.

IV

That it appears that net credit balances amounted to approximately $352,000.00 as of January 29, 1971 which will immediately reduce the sum to be realized by approximately this amount. On the other hand, there are assets of the corporation which the Receiver has not yet been able to liquidate but which it is anticipated will eventually contribute to the payment of the costs of the receivership. Any sum left in the reserve account upon final termination of this proceeding will be distributed to bond owners on a pro rata basis.

V

That in the case of bond owners who, prior to June 1, 1971 fail to advance a sum of money equal to 5% (as adjusted) of the bonds owned by them, the Receiver will retain the bonds and continue clipping the coupons until the required amount has been realized. As an alternative, such bond owners may elect, by notifying the Receiver in writing prior to June 1, 1971, to receive one-half of the coupon interest earned from April 1, 1971, as collected by the Receiver, until such time as the required amount is accumulated or this proceeding is terminated, whichever occurs first.

Wherefore, Premises Considered, Petitioner Prays:

1. That a copy of this Petition be mailed to designated counsel of record and petitioners who have filed claims without benefit of counsel and that a hearing be held at the earliest practicable date.

2. That at the hearing an Order be entered approving the foregoing plan for partial liquidation and distribution or such

modification or substitute therefor as to the Court may seem proper and appropriate.

3. For general relief.

/s/ JAMES C. BARBOUR
Receiver

/s/ W. OVID COLLINS, JR.
Attorney for the Receiver

State of Tennessee }
County of Davidson }

James C. Barbour, being first duly sworn, makes oath that the statements contained in his foregoing Petition are true to the best of his knowledge, information and belief.

/s/ JAMES C. BARBOUR

Sworn to and subscribed before me this 5th day of April, 1971.

/s/ PATRICIA R. SILLS
Notary Public

My commission expires: Nov. 24, 1974.

Entered:

April 19, 1971

In the United States District Court
For the Middle District of Tennessee
Nashville Division

Securities and Exchange Commission vs. Guaranty Bond and Securities Corporation, et al.	Civil Action No. 5989

Order No. 22

This cause having come on to be heard upon the Receiver's Petition No. 14, proposing a plan for partial distribution, it is Ordered that such plan be put into effect as to all bond owners who file no written objections thereto with the Clerk of this Court within 20 days from the date hereof. All such objections will be disposed of by the Court in due course.

It is accordingly Ordered that all bonds now in the custody of the Receiver and in the custody of the various attorneys and institutions under Order No. 10 shall be released to the record owners upon deposit with the Nashville City Bank & Trust Company or the owner's bank to the Receiver's credit, of a sum of money in cash, equivalent to 5% gross of the face amount of the bonds as of January 29, 1971 adjusted by credit and debit balances as of the settlement date but only to the extent that such balances represent traceable funds of the bond owners impressed with a trust in the hands of the Receiver.

Statements of account will be issued by the Receiver as promptly as possible so that the amount of the required deposit can be ascertained by each bond owner. In cases where credit balances consisting of trust funds exceed 5% of the face value of the bonds, distribution of such excess amounts need not be made by the Receiver until sufficient funds are accumulated in the reserve account to pay all such amounts.

The Receiver will retain the bonds of owners who fail to advance the required deposit by June 1, 1971 and continue clipping the coupons until the amount of the deposit has been realized but any such bond owners who so elect by notifying the Receiver in writing prior to June 1, 1971, may receive one-half of the coupon interest earned from April 1, 1971, as collected by the Receiver, until such time as the required amount is accumulated or this proceeding is terminated, whichever occurs first.

A copy of this Order will be mailed by the Clerk to all parties of record or their counsel.

/s/ L. CLURE MORTON
District Judge

Approved for Entry:

W. OVID COLLINS, JR.
Attorney for the Receiver